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Settlement of disputes clauses

Note by the Secretariat

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I. Introduction

1. At its sixty-first session, in 2009, the International Law Commission decided that, at its sixty-second session, it would devote at least one meeting under the agenda item "Other matters" to a discussion of "Settlement of disputes clauses". In that connection, the Commission requested the Secretariat "to prepare a note on the history and past practice of the Commission in relation to such clauses, taking into account recent practice of the General Assembly".[1] The present note has been prepared pursuant to that request.

2. The present note is divided into three parts. The first part (section II below) provides an overview of the history of the study by the Commission of topics related to the settlement of disputes. The second part (section III) details the practice followed by the Commission in relation to settlement of disputes clauses. It first examines relevant clauses as they have been included in draft articles adopted by the Commission; it then considers other draft articles in which the inclusion of such clauses, while substantially discussed, has not been eventually retained. For each set of draft articles, a brief description is provided of the factors considered by the Commission in deciding to include, or not, settlement of disputes clauses and, if applicable, of the settlement of disputes clause eventually included in the instrument. Finally, the third part (section IV) provides information on the recent practice of the General Assembly in relation to settlement of disputes clauses inserted in conventions which have not been concluded on the basis of draft articles adopted by the Commission.

II. Topics relating to the settlement of disputes completed or already considered for possible future study by the Commission

3. At its tenth session, in 1958, the Commission completed its study of arbitral procedure by adopting a set of model rules on the issue. Since then, the Commission has not considered topics directly dealing with the settlement of disputes but addressed on several occasions the possibility of devoting a study to specific aspects of that legal field.

A. Model Rules on Arbitral Procedure, 1958

4. At its first session, in 1949, the Commission selected arbitral procedure as one of the topics for codification to which it gave priority and appointed Georges Scelle as Special Rapporteur.[2] The Commission considered this topic at its second, fourth, fifth, ninth and tenth sessions, in 1950, 1952, 1953, 1957 and 1958, respectively. In 1952, the Commission adopted on first reading a draft on arbitral procedure and communicated it to Governments for comments.[3] The following year, the

[1] *Official Records of the General Assembly, Sixty-fourth Session, Supplement No. 10* (A/64/10), p. 366, para. 238.

[2] See *Yearbook of the International Law Commission 1949*, p. 281, paras. 17 and 21.

[3] *Yearbook ... 1952*, vol. II, p. 58, para. 14.

Commission adopted the revised draft on arbitral procedure.[4] In its report on the fifth session to the General Assembly, the Commission expressed the view that the draft, which was then intended to be final, should be recommended to Member States with a view to the conclusion of a convention.[5]

5. The Commission emphasized that the draft had a dual aspect, representing both a codification of existing law on international arbitration and a formulation of what the Commission considered to be desirable developments in the field.[6] Thus the Commission had taken as a basis the traditional features of arbitral procedure in the settlement of international disputes, such as those relating to the undertaking to arbitrate, the constitution and powers of an arbitral tribunal, the general rules of evidence and procedure and the award of arbitrators. At the same time, the Commission had also provided certain procedural safeguards for securing the effectiveness, in accordance with the original common intention of the parties, of the undertaking to arbitrate.[7]

6. The draft was considered by the General Assembly at its eighth and tenth sessions, in 1953 and 1955, and subjected to criticism, particularly in view of the Commission's recommendation for the conclusion of a convention on the topic. The Assembly, in resolution 989 (X) of 14 December 1955, noting that a number of suggestions for improvements on the draft had been put forward, invited the Commission to consider the comments of Governments and the discussions in the Sixth Committee in so far as they might contribute further to the value of the draft on arbitral procedure, and to report to the Assembly at its thirteenth session.

7. At its ninth session, in 1957, the Commission appointed a committee to consider the matter in the light of the General Assembly resolution.[8] The committee came to the conclusion that it would be necessary for the Commission to decide on the ultimate object to be attained in reviewing the draft on arbitral procedure and, in particular, whether that object should be a convention or simply a set of rules which might inspire States, wholly or in part, in the drawing up of provisions for inclusion in international treaties and special arbitration agreements. The Commission decided in favour of the second alternative.[9]

8. At its tenth session, in 1958, the Commission adopted a set of "Model Rules on Arbitral Procedure" followed by a general commentary.[10] In submitting the final set to the General Assembly in the report on its tenth session, the Commission recommended that the Assembly adopt the report by resolution.[11] The Assembly, in resolution 1262 (XIII) of 14 November 1958, took note of chapter II on arbitral procedure of the Commission's report on its tenth session, brought the draft articles on arbitral procedure to the attention of Member States for their consideration and use, and invited Governments to send to the Secretary-General any comments they

[4] *Yearbook ... 1955*, vol. II, p. 208, para. 57.

[5] Ibid., para. 55.

[6] Ibid., para. 54.

[7] For example, in order to prevent one of the parties from avoiding arbitration by claiming that the dispute in question was not covered by the undertaking to arbitrate, the draft provided for a binding decision by the International Court of Justice as to the arbitrability of the dispute (article 2).

[8] *Yearbook ... 1957*, vol. II, p. 143, para. 18.

[9] Ibid., pp. 143 and 144, para. 19.

[10] *Yearbook ... 1958*, vol. II, p. 83, para. 22.

[11] Ibid., p. 82, para. 17.

might wish to make on the draft, and in particular on their experience in the drawing up of arbitral agreements and the conduct of arbitral procedure, with a view to facilitating a review of the matter by the United Nations at an appropriate time.

B. Topics relating to the settlement of disputes already considered for possible future study by the Commission

1. Review of the "pacific settlement of international disputes" as a possible topic for codification in 1949

9. At its first session, in 1949, the Commission undertook a survey of the whole field of international law with a view to selecting particular topics the codification of which it considered necessary or desirable.[12] On the basis of a proposal by Ricardo J. Alfaro,[13] the Commission had an exchange of views on the necessity of retaining the pacific settlement of international disputes as a suitable topic. A variety of opinions was expressed, some members of the Commission indicating that the question was only procedural or pertaining to progressive development, while others supported the proposal on the understanding that a study of the topic by the Commission should not duplicate the work done by the Interim Committee of the General Assembly.[14] At the end of that debate,[15] the Commission eventually decided not to include the topic in the provisional list of those selected for codification.[16]

2. Consideration by the Commission of the subject of the peaceful settlement of disputes on the basis of the "Survey of international law" prepared by the Secretary-General in 1971

10. At its twentieth session, in 1968, the Commission decided to give attention to its long-term programme of work and for that purpose asked the Secretary-General to prepare a new survey of the whole field of international law on the lines of the memorandum entitled "Survey of international law in relation to the work of codification of the International Law Commission" (A/CN.4/1/Rev.1),[17] submitted at the Commission's first session in 1949. On the basis of such a new survey, the Commission could then draw up a list of topics that were ripe for codification. Pursuant to that request, the Secretariat submitted, at the twenty-second session of the Commission, in 1970, a preparatory working paper concerning the review of the Commission's programme of work.[18] In the part of that working paper devoted to topics suggested or recommended for inclusion in the Commission's programme of work, the Secretariat summarized views and proposals put forward by Member States regarding the pacific settlement of international disputes, particularly in

[12] See *Yearbook ... 1949*, p. 280, para. 13.

[13] Ibid., p. 43, para. 70.

[14] Ibid., pp. 43 and 44, paras. 69-82.

[15] The Chairman of the Commission, Manley O. Hudson, concluded that "the general opinion for the moment did not favour retaining the question of the pacific settlement of international disputes among the topics the codification of which seemed necessary or desirable" (ibid., p. 44).

[16] Ibid., p. 281, para. 16. The topic "arbitral procedure" was separately included in the provisional list (see sect. II.A above).

[17] United Nations publication, Sales No. 1948.V.1(1).

[18] See *Yearbook ... 1970*, vol. II, p. 247, document A/CN.4/230.

respect of the "recourse to procedures for investigation, mediation and conciliation"[19] and of the "obligatory jurisdiction of the International Court of Justice".[20] The Secretariat also indicated that the study of the topic "Model rules on conciliation" had also been suggested by a member of the Commission in 1967.[21]

11. At its twenty-third session, in 1971, the Commission had before it another working paper entitled "Survey of International Law",[22] prepared by the Secretary-General in response to the Commission's request referred to above. The working paper contained some information regarding the consideration by the Commission of the subject of the peaceful settlement of disputes;[23] it contained a concluding assessment reading as follows:

> The Commission has not in general been concerned, when elaborating texts setting out substantive rules and principles, with determining the method of implementation of those rules and principles, or with the procedure to be followed for resolving differences arising from the interpretation and application of the substantive provisions — with one exception. That exception arises when the procedure is seen as inextricably entwined with, or as logically arising from, the substantive rules and principles, or, in the Commission's words "as an integral part" of the codified law. Otherwise the question of the settlement of disputes and, indeed, of implementation as a whole, have been regarded as issues to be decided by the General Assembly or by the codification conference of plenipotentiaries which acts on the draft.[24]

12. The Commission considered the issue in the context of its review of its long-term programme of work both in 1971 and during its twenty-fifth session, in 1973.[25] It listed the "peaceful settlement of disputes" as one of the "[o]ther topics on which one or more members thought that the Commission might envisage undertaking work",[26] and decided to give further consideration to the various proposals suggested in the course of future sessions.[27]

3. Topics relating to settlement of disputes listed as possible future topics under the long-term programme of work in 1996

13. At its forty-eighth session, in 1996, the Commission decided to establish a working group on the long-term programme of work to assist it in selecting topics for future study.[28] As a result of that exercise, the Commission established a scheme of 13 "very general fields of public international law governed mainly by rules of customary international law".[29] Under each of those fields, the committee listed topics which had already been completed, those which had been previously

[19] Ibid., pp. 262 and 263, paras. 92 and 93.
[20] Ibid., p. 263, paras. 97-100.
[21] Ibid., p. 269, para. 143; see also *Yearbook ... 1967*, vol. I, p. 188, 929th meeting, para. 73.
[22] See *Yearbook ... 1971*, vol. II (Part Two), p. 24, document A/CN.4/245.
[23] Ibid., pp. 31-34, paras. 130-144.
[24] Ibid., pp. 33 and 34, para. 144 (the exception referred to concerned the provision for the settlement of disputes relating to the invalidity, termination and suspension of the operation of treaties, included in the draft articles on the law of treaties; see sect. III.A.4 below).
[25] See *Yearbook ... 1973*, vol. II, pp. 230 and 231, paras. 170-176.
[26] Ibid., para. 173.
[27] Ibid., p. 231, para. 174.
[28] See *Yearbook ... 1996*, vol. II (Part Two), p. 97, para. 244.
[29] Ibid., annex II, p. 133, para. 2 (a).

proposed by the Commission or by individual members, and "some possible topics on which the Commission does not intend to take a firm position on their feasibility for future work".[30] Under the field "Settlement of disputes", the Commission mentioned the Model Rules on Arbitral Procedure as the only topic already completed.[31] As possible future topics, together with the "Pacific settlement of international disputes [1949]",[32] it listed "Model clauses for the settlement of disputes relating to application or interpretation of future codification conventions" and "Mediation and conciliation procedures through the organs of the United Nations".[33] Since then, the Commission has not addressed the settlement of disputes as a potential topic for future study; reference to such a possibility was, however, expressly made during the final debate on the draft articles on responsibility of States for internationally wrongful acts.[34]

III. Practice of the Commission in relation to settlement of disputes clauses

14. Although no general debate has so far been held by the Commission regarding settlement of disputes clauses,[35] the possibility and ways of including such clauses have frequently been addressed in the course of discussions on specific draft articles. The present section examines in turn the clauses eventually included in the draft articles adopted by the Commission, and other draft articles in which the inclusion of such clauses, while substantially discussed, has not been finally retained. In each case, the factors considered by the Commission in deciding upon the clauses and, if applicable, the mechanism eventually adopted in the instrument are briefly described.

A. Settlement of disputes clauses included in drafts adopted by the Commission

15. This section examines the provisions regarding settlement of disputes included in the final drafts adopted by the Commission on various topics of international law. For each instrument, it describes the settlement of disputes mechanism; the rationale for the inclusion of such a regime as it emerges from the discussion in the Commission; and any subsequent action taken by the General Assembly or the diplomatic conference.

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[30] Ibid., para. 2 (c).

[31] See sect. II.A above.

[32] See sect. II.B.1 above.

[33] See *Yearbook ... 1996*, vol. II (Part Two), annex II, p. 136.

[34] During the plenary debate, one member indicated that "The question of dispute settlement was undoubtedly a fundamental problem in itself, a general problem on which the Commission might one day, in the framework of its long-term programme of work, prepare some sort of model clauses on dispute settlement for insertion in the codification conventions" (*Yearbook ... 2001*, vol. I, pp. 14 and 15, para. 40 (2668th meeting)).

[35] For the purposes of the present note, "settlement of disputes clauses" are understood either as those which have been considered as such by the Commission or as those which refer to one or several of the peaceful means of settlement of disputes enumerated in Article 33 of the Charter of the United Nations.

1. Draft convention on the reduction of future statelessness and draft convention on the elimination of future statelessness, 1954

16. The two draft conventions adopted by the Commission in 1954 contained identical settlement of disputes clauses, according to which the parties undertook to establish an agency to act on behalf of stateless persons and, within the framework of the United Nations, a tribunal to decide both complaints presented by that agency on behalf of the persons concerned and disputes brought by the parties. The parties also agreed that any dispute between them not referred to the tribunal be submitted to the International Court of Justice.[36]

17. At its fifth session, in 1953, the Commission concluded that the establishment of an agency representing stateless persons and of a tribunal where those persons, through the agency, could bring their claims, was necessary given the specific and vulnerable situation of persons threatened with statelessness; the details of the organization of the agency and the tribunal were, however, in the opinion of the Commission, to be provided by the contracting parties.[37] During the sixth session, different views were expressed as to the possibility of establishing the tribunal as a procedure of first instance and the International Court of Justice as an appellate jurisdiction: some members of the Commission mentioned as a potential issue of dual jurisdiction the possibility of having the tribunal and the Court dealing with the same submission simultaneously. The objection to establishing such a tribunal expressed by some Governments in their comments was also recalled during the debate in plenary.[38] The Commission finally decided that jurisdiction on disputes between the parties should be vested with the "special tribunal" but that those disputes, if not referred to the tribunal, should be adjudicated by the International Court of Justice.[39]

18. The text of the Convention on the Reduction of Statelessness adopted at the United Nations Conference on the Elimination or Reduction of Future Statelessness in 1961 only retained the submission to the International Court of Justice at the request of any party to the dispute if the difference could not be settled by other means.[40] The idea of establishing an agency to act on behalf of stateless persons and a tribunal was not ultimately retained.

2. Articles concerning the law of the sea, 1956

19. In the Articles concerning the law of the sea adopted by the Commission in 1956, two sets of settlement of disputes procedures were provided for disputes regarding living resources of the high seas and the continental shelf, respectively.[41] A seven-member arbitral commission which could order preliminary measures and take decisions binding upon the parties in dispute was designed to settle disputes concerning the living resources, while disputes regarding the continental shelf were to be submitted to the International Court of Justice at the request of any of the parties to the dispute, unless they agreed on another method of peaceful settlement.

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[36] *Yearbook ... 1954*, vol. II, p. 145 (article 11 of both conventions).

[37] *Yearbook ... 1953*, vol. II, pp. 227 and 228, paras. 157-160.

[38] *Yearbook ... 1954*, vol. I, pp. 12-14, paras. 12-39 (244th meeting); p. 15, paras. 13-21 (245th meeting).

[39] *Yearbook ... 1954*, vol. II, p. 142, paras. 23 and 24.

[40] United Nations, *Treaty Series*, vol. 989, No. 14458. See article 14.

[41] *Yearbook ... 1956*, vol. II, pp. 263 and 264 (articles 57-59 and 73, respectively).

20. A wide variety of views was expressed in the Commission concerning the procedure for solving disputes regarding the living resources of the high seas. The insertion of a compulsory arbitration clause was opposed on the ground that the task of the Commission was to codify or develop the law but not to safeguard its application.[42] For some members, a general reference to existing provisions imposing on States an obligation to settle their disputes peacefully was sufficient.[43] The majority, however, was of the view that an impartial authority was essential to secure the effective application of the draft articles,[44] and that the idea of an ad hoc arbitral commission would be more likely to be accepted by States than that of a central permanent judicial authority.[45]

21. There were also several approaches in the Commission concerning the settlement of disputes regime for the continental shelf. Initially, the Articles only contained a general arbitration clause.[46] The main reason for including such a clause instead of simply referring to the peaceful means of settlement of disputes provided in Article 33 of the Charter was to reconcile the rights of coastal States and the long-respected freedom of the high seas, and to leave room for "a measure of elasticity and discretion" in this exercise of reconciliation.[47] The Commission later amended the article and provided that disputes regarding the continental shelf should be submitted to the International Court of Justice at the request of any of the parties, unless they agreed on another method of peaceful settlement.[48] In doing so, the majority of the Commission dissociated itself from the objection made by some members to the effect that the insertion of such a clause would render the draft "unacceptable to a great many States".[49] It also deliberately differentiated itself from the arbitral commission regime designed for disputes regarding living resources in the high seas, on the ground that matters regarding the continental shelf would not be "of an extremely technical character as in the case of the conservation of the living resources of the sea".[50]

22. During the debate on the topic, the Commission also considered the possibility of adopting a rule pursuant to which all disputes concerning the breadth of the territorial sea should be submitted to the compulsory jurisdiction of the International Court of Justice.[51] The Commission decided, however, not to include such a clause on the ground that "the international community had not yet succeeded in formulating a rule of law" on the matter, which would make it inappropriate to "delegate an essentially legislative function to a judicial organ".[52]

23. The Convention on Fishing and Conservation of Living Resources of the High Seas adopted in 1958[53] contains an arbitral commission procedure similar to that included in the draft prepared by the Commission. All other matters arising out of

[42] *Yearbook ... 1956*, vol. II, p. 288, para. 17.
[43] Ibid.
[44] *Yearbook ... 1956*, vol. II, p. 288, para. 18.
[45] *Yearbook ... 1956*, vol. II, p. 288, para. 19.
[46] *Yearbook ... 1953*, vol. II, p. 213.
[47] *Yearbook ... 1953*, vol. II, p. 217, para. 87.
[48] *Yearbook ... 1956*, vol. II, p. 300, article 73.
[49] Ibid., commentary to article 73, para. 4.
[50] Ibid., para. 3.
[51] *Yearbook ... 1956*, vol. II, p. 266, commentary to article 3, para. 9.
[52] Ibid.
[53] United Nations, *Treaty Series*, vol. 559, No. 8164. See articles 9-12.

the interpretation or application of any of the conventions on the law of the sea of 1958 are subject to the compulsory jurisdiction of the International Court of Justice as stipulated in the Optional Protocol of Signature concerning the Compulsory Settlement of Disputes.[54]

3. Draft articles on diplomatic intercourses and immunities, 1958

24. Article 45 of the draft articles on diplomatic intercourses and immunities adopted by the Commission in 1958 provided that, when disputes concerning the interpretation or application of the Convention could not be settled through diplomatic channels, they should be referred to conciliation or arbitration or, failing that, they should, at the request of either of the parties, be submitted to the International Court of Justice.[55]

25. During the Commission's debate on the topic, different opinions emerged on whether, where in the draft and in what form a settlement of disputes clause should be adopted. Some members believed that the Commission should focus on the codification of substantive rules, without dealing with the question of their implementation, while others suggested dealing with the settlement of disputes procedure in the form of a protocol. For the majority, however, it was necessary to provide for a dispute settlement procedure ultimately referring to the jurisdiction of the Court in the text, if the draft were to be submitted in the form of a Convention.[56]

26. The Optional Protocol to the Vienna Convention on Diplomatic Relations, concerning the Compulsory Settlement of Disputes, adopted in 1961,[57] contains a procedure which is substantially identical to that proposed by the Commission.

4. Draft articles on the law of treaties, 1966

27. In the draft articles on the law of treaties adopted in 1966, the Commission designed a specific procedure of notification to be followed in cases of invalidity, termination, withdrawal from or suspension of the operation of a treaty.[58] Draft article 62 provided in particular that, if an objection to the notification by one party was raised by any other party, the parties should seek a solution through the means indicated in Article 33 of the Charter of the United Nations.[59]

28. The necessity of including a general reference to the peaceful settlement of disputes in the specific context of invalidity, termination or suspension of the operation of a treaty was first emphasized by the Commission as a means to limit the effect that arbitrary assertions may have on the stability of treaties.[60] Although some members of the Commission supported, especially during the first reading of the draft articles,[61] the need to provide for compulsory judicial settlement by the International Court of Justice should the parties fail to agree on another means of settlement, the Commission eventually confined itself to a mere reference to Article 33 of the Charter, on the understanding that the establishment in the draft of these

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[54] Ibid., vol. 450, No. 6466.

[55] *Yearbook ... 1958*, vol. II, p. 105.

[56] Ibid.

[57] United Nations, *Treaty Series*, vol. 500, No. 7312.

[58] *Yearbook ... 1966*, vol. II, p. 261, draft article 62.

[59] *Yearbook ... 1966*, vol. II, p. 262, draft article 62, para. 3.

[60] See *Yearbook ... 1963*, vol. II, p. 214, commentary to draft article 51, para. 1.

[61] See ibid., p. 215, para. 2.

procedural provisions "as an integral part of the law relating to the invalidity, termination and suspension of the operation of treaties" would be "a valuable step forward".[62]

29. In the 1969 Vienna Convention on the Law of Treaties,[63] the settlement of disputes procedure is provided for in two separate articles. Article 65, dealing with the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty, is substantially identical to draft article 62 as adopted on second reading by the Commission. Article 66 specifically details the procedures for judicial settlement, arbitration and conciliation to be followed in cases in which the notifying and objecting parties under article 65 have not been able to solve their dispute within a period of 12 months. At the United Nations Conference on the Law of Treaties, the settlement of disputes relating to the application of norms of *jus cogens* was given specific consideration: according to article 66 (a) of the Vienna Convention, unless the parties agree to resort to arbitration, any of them may request a decision from the International Court of Justice when the dispute relates to the application or interpretation of article 53 or 64 of the Convention. For disputes relating to any other provision in part V of the Convention, any of the parties may set in motion the procedure of conciliation specified in the Annex to the Convention.

5. Draft articles on the representation of States in their relations with international organizations, 1971

30. In the draft articles on the representation of States in their relations with international organizations, adopted at the twenty-third session, in 1971, the Commission included a dual mechanism for the settlement of disputes. Draft article 81 first organized a procedure of consultations, should a dispute arise between the sending State, the host State and the organization, to be held at the request of any of them.[64] If the dispute could not be disposed of as a result of this initial process, draft article 82 provided that it be either submitted to any procedure established in the organization or, at the request of any State party to the dispute, to a conciliation commission to be constituted in accordance with the provisions of the article.[65]

31. Initially, the Commission had only envisaged including in the draft articles a provision regarding the possible holding of consultations.[66] In the light of comments received from some Governments,[67] the Commission later re-examined the question and added, in draft article 82, the utilization of any procedure available in the organization, as "the logical steps following the consultation in case they prove unsatisfactory",[68] and the conciliation procedure, as "the largest measure of common ground that could be found at present among Governments as well as in the Commission on the question".[69]

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[62] *Yearbook ... 1966*, vol. II, p. 263, commentary to draft article 62, para. 6.
[63] United Nations, *Treaty Series*, vol. 1155, No. 18232.
[64] *Yearbook ... 1971*, vol. II (Part One), p. 333.
[65] Ibid., draft article 82, para. 1.
[66] See *Yearbook ... 1969*, vol. II, p. 221, draft article 50.
[67] See *Yearbook ... 1971*, vol. II (Part One), p. 334, commentary to draft article 82, para. 5.
[68] Ibid., para. 7.
[69] Ibid., para. 6.

32. In the Vienna Convention on the Representation of States in their Relations with International Organizations of a Universal Character, concluded in Vienna on 14 March 1975,[70] the settlement of disputes regime is provided in articles 84 and 85. Article 84 is largely similar to draft article 81, although it does not put the organization on an equal footing with the States parties to the dispute. Article 85 mainly deals with the submission of the dispute to, and the composition and functions of, the conciliation commission; it specifies that the recommendations formulated by the commission shall not be binding on the parties to the dispute unless they all have accepted them.

6. Draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons, 1972

33. Although the Commission retained in its draft articles on the prevention and punishment of crimes against diplomatic agents and other internationally protected persons a settlement of disputes clause similar in some respects to the one adopted in the draft articles on the representation of States in their relations with international organizations, it took an innovative approach to the manner in which such a clause was to be incorporated in the text. Article 12 of the draft adopted at the twenty-fourth session, in 1972, was indeed presented in alternative formulations providing, respectively, for the reference of the dispute to conciliation (alternative A) or to an optional form of arbitration (alternative B).[71] As emphasized by the Commission itself, alternative A "reproduce[d], with the requisite adaptations, article 82 of the draft articles on the representation of States in their relations with international organizations".[72] As to alternative B, it provided for compulsory arbitration, accompanied by the possibility of referring the dispute to the International Court of Justice should the parties fail to agree on the organization of the arbitration, but expressly included a provision allowing the parties to make a reservation to that particular article.[73]

34. In deciding to include in the draft these alternative methods of settlement of disputes, the Commission had to make a number of assessments. First, it considered that "a variety of disputes could arise out of the draft articles",[74] although some of its members were of a different opinion and believed that potential disputes under the draft articles would, by their nature, be "unamenable to the application of settlement procedures".[75] Secondly, the Commission concluded that the conciliation or arbitration procedures "represent[ed] the largest measure of common ground that would appear to exist at present among Governments on the question of dispute settlement"[76] and decided to submit alternative formulations as a way of "seeking an expression of views from Governments"[77] on the issue.

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[70] See *Official Records of the United Nations Conference on the Representation of States in their Relations with International Organizations*, vol. II (United Nations publication, Sales No. E.75.V.12).

[71] See *Yearbook ... 1972*, vol. II, pp. 321 and 322, draft article 12.

[72] Ibid., p. 322, commentary to draft article 12, para. 3.

[73] Ibid., para. 4.

[74] Ibid., para. 1.

[75] Ibid.

[76] Ibid.

[77] Ibid.

35. Article 13 of the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents,[78] adopted in 1973, provides a procedure very similar to that embodied in alternative B of draft article 12.

7. Draft articles on the law of treaties between States and international organizations or between international organizations, 1982

36. In addressing the issue of the settlement of disputes in the context of the law of treaties between States and international organizations or between international organizations, the Commission referred both to its own draft articles on the law of treaties adopted in 1966 and to the additions brought to this general provision during the United Nations Conference on the Law of Treaties. The draft articles on the law of treaties between States and international organizations or between international organizations adopted by the Commission at its twenty-fourth session in 1982, thus substantially reproduced the mechanism established under the 1969 Vienna Convention on the Law of Treaties,[79] with some modifications justified by the particularities entailed by the potential involvement of an international organization in the dispute.

37. Emphasizing that the system it had proposed regarding the procedure to be followed with respect to invalidity, termination, withdrawal from or suspension of the operation of a treaty had been endorsed during the Conference on the Law of Treaties, the Commission decided to extend it to the draft articles, so as "to ensure a fair procedure for the [parties] in dispute, based on notification, exploration, a moratorium, and the possibility of recourse to the means for settlement specified in Article 33 of the Charter".[80]

38. In deciding to transpose to the draft articles the settlement of disputes clause adopted at the Vienna Conference on the Law of Treaties, the Commission acknowledged the "peculiarities of article 66",[81] which appeared in the body of the treaty, and not among its final clauses, and covered only disputes pertaining to part V of the Vienna Convention.[82] After considering various means of addressing the "major procedural difficulty"[83] entailed by the impossibility of international organizations being parties to cases before the International Court of Justice, the Commission eventually opted for a "simple"[84] solution, according to which disputes concerning draft articles 53 and 64 would be submitted to arbitration whilst for disputes concerning other provisions in part V, the system of compulsory recourse to conciliation instituted by the 1969 Vienna Convention would be retained.[85]

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[78] See United Nations, *Treaty Series*, vol. 1035, No. 15410.

[79] See para. 29 above.

[80] *Yearbook ... 1982*, vol. II (Part Two), p. 63, commentary to draft article 65, para. 2. The Commission proposed two amendments to the text of article 65 of the Vienna Convention concerning the time limit for making an objection and the submission of the notification of objection made by an international organization to the rules of that organization (*Ibid.*, pp. 63 and 64, at paras. 3-5). The latter amendment was retained in the 1986 Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[81] *Ibid.*, p. 64, commentary to draft article 66, para. 2.

[82] *Ibid.*

[83] *Ibid.*, p. 65, para. 4.

[84] *Ibid.*, para. 6.

[85] *Ibid.*

39. The settlement of disputes mechanism provided for in article 66 of the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations[86] appears in some respects more complex than the one adopted by the Commission, particularly as far as disputes regarding the application or interpretation of articles 53 or 64 of the Convention are concerned. Depending on the character of the parties to the dispute, the International Court of Justice may indeed be called to render a decision or give an advisory opinion, unless all the parties to the dispute agree to submit it to an arbitration procedure.[87]

8. Draft articles on the law of the non-navigational uses of international watercourses, 1994

40. As emphasized by the Commission itself, draft article 33 of the draft articles on the law of the non-navigational uses of international watercourses provided "a basic rule for the settlement of watercourse disputes",[88] residual in nature and consisting in a three-step procedure: if unsuccessful, consultations and negotiations should be followed by recourse to methods of impartial fact-finding, through a fact-finding commission; mediation or conciliation; and finally arbitration or judicial settlement upon agreement of the parties concerned.[89]

41. Although the rule embodied in draft article 33 may thus appear basic in character, the question of including settlement of disputes clauses in the draft articles gave rise to an extensive debate in the Commission, particularly at the beginning of the second reading of the draft.[90] Some members doubted the value of inserting such clauses, given the diversity of watercourses and "the flexibility of the instrument being prepared"; in their view, disputes in that respect "could more effectively be resolved by political means, rather than by adjudication".[91] Conversely, other members pointed to the increasing needs of populations and the scarcity of the resource as supporting the necessity to provide for technical means of solving watercourse disputes.[92] The majority in the Commission ultimately joined the Special Rapporteur in considering that the recommendation of a "tailored set of

[86] A/CONF.129/15.

[87] See articles 65 and 66 of the Convention on the Law of Treaties between States and International Organizations or between International Organizations.

[88] *Yearbook ... 1994*, vol. II (Part Two), p. 134, commentary to draft article 33, para. 1.

[89] Ibid., pp. 134 and 135, paras. 2-11. The Commission also provided the requirement of notification, negotiation and consultation for States wishing to implement planned measures regarding international watercourses, in order to maintain an equitable balance between the parties and avoid disputes among them regarding the uses of watercourses (ibid., pp. 111-118, draft articles 11-19).

[90] See *Yearbook ... 1993*, vol. II (Part Two), p. 86, paras. 351-357.

[91] Ibid., para. 353.

[92] Ibid., para. 352. The view was also expressed that the "elasticity of the substantive rules made it indispensable to provide for" compulsory fact-finding, conciliation, arbitration and judicial settlement (ibid., para. 357).

provisions"[93] on dispute settlement would constitute an "important contribution"[94] even if the draft articles were to take the form of model rules.[95]

42. While article 33, on the settlement of disputes, of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses[96] maintains the residual character of the draft article adopted by the Commission, it differs significantly from it. Thus, if the parties concerned cannot solve their dispute by negotiation, they may jointly seek a settlement through good offices, mediation, conciliation or the use of joint watercourse institutions or agree to submit their dispute to arbitration or to the International Court of Justice. The recourse to an impartial fact-finding commission at the request of any of the parties to the dispute is understood as an ultimate recommendatory procedure for an equitable solution of the dispute, should the other means previously listed have failed to provide for a settlement.

9. Draft articles on the prevention of transboundary harm from hazardous activities, 2001

43. As indicated by the Drafting Committee, article 19 of the draft articles on the prevention of transboundary harm from hazardous activities is a revision, "in summary form", of article 33 of the Convention on the Law of the Non-navigational Uses of International Watercourses, "which had been extensively negotiated by States and found acceptable".[97] It is "residual in nature",[98] as it applies in the absence of any other agreement by the States concerned for the settlement of their disputes; failing an agreement on the traditional means for dispute settlement to be resorted to, draft article 19 provides for a compulsory procedure for the appointment of an impartial fact-finding commission, the recommendations of which are to be considered in good faith by the parties.[99]

44. The provisions of draft article 19, as explained by the Drafting Committee, were intended to strike a fair balance between different imperatives. On the one hand, and in contrast to the provision on settlement of disputes adopted on first reading,[100] it was felt necessary to refrain from including in the draft a mere "'disabled' dispute settlement mechanism",[101] i.e. a mechanism requiring the full cooperation of all the parties for the setting up of a fact-finding commission. On the other hand, it was considered prudent "not to establish fully-fledged dispute settlement provisions which might serve as a disincentive to ratification by Governments".[102]

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[93] Ibid., para. 351.

[94] Ibid.

[95] The resolution on confined transboundary groundwater adopted by the Commission upon completion of the second reading of the draft contains an explicit recommendation to the effect that States consider resolving disputes involving transboundary confined groundwaters in accordance with the provisions contained in article 33 of the draft articles (see *Yearbook ... 1994*, vol. II (Part Two), p. 135).

[96] See General Assembly resolution 51/229, annex.

[97] *Yearbook ... 2001*, vol. I, p. 63, para. 28.

[98] *Yearbook ... 2001*, vol. II (Part Two), p. 170, commentary to draft article 19, para. 1.

[99] Ibid., pp. 169 and 170, draft article 19.

[100] See *Yearbook ... 1998*, vol. II (Part Two), p. 41, draft article 17.

[101] *Yearbook ... 2001*, vol. I, p. 63, para. 27.

[102] Ibid., para. 28.

B. Settlement of disputes clauses discussed but not eventually included in the drafts adopted by the Commission

45. A brief overview of the drafting history of the articles adopted by the Commission since its first session shows that, in almost half the cases, the necessity and opportunity to insert settlement of disputes clauses did not arise as a matter for discussion.[103] This section examines the draft articles in the context of which the possibility of including such clauses, while substantially discussed, has not been finally retained. While the list presented hereafter is not intended to be exhaustive, it aims to further illustrate the manner in which the Commission has addressed issues relating to settlement of disputes clauses in its history.

1. Draft articles on succession of States in respect of treaties, 1974

46. In the course of the concluding debates on the first reading of the draft articles on succession of States in respect of treaties, in 1972, some members of the Commission stressed the importance of examining in due course the question of the possible need for provisions concerning the settlement of disputes arising out of the interpretation and application of the draft. The Commission, however, considered it premature to take up the question at that stage.[104]

47. The issue was to arise again in the course of the second reading of the draft articles, on the basis of comments made by some Governments foreseeing difficulties in the application of the articles and, hence, the need for some settlement of disputes procedure.[105] Given the conceptual relationship existing between the draft articles on succession of States in respect of treaties and the Vienna Convention on the Law of Treaties, some members of the Commission supported the inclusion in the former of procedures for settlement of disputes based on the provisions of the latter.[106] Ultimately, the view prevailed that "the Commission should not pursue the matter further without reference to the General Assembly",[107] on the understanding that the question could be given further consideration if the Assembly so wished in preparation for a convention.[108]

48. The 1978 Vienna Convention on Succession of States in Respect of Treaties contains a Part VI entirely devoted to the settlement of disputes, which refers in turn to consultation and negotiation, conciliation (under a procedure designated in an annex to the Convention), judicial settlement and arbitration upon individual declarations of acceptance by the parties or by common consent.[109]

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[103] Obviously, the absence of debate on the issue in the Commission does not prevent the eventual adoption of settlement of disputes mechanisms in instruments which, like the 1963 Vienna Convention on Consular Relations or the 1969 Convention on Special Missions (both of which are accompanied by an optional protocol on the compulsory settlement of disputes), have been concluded on the basis of draft articles adopted by the Commission.

[104] See *Yearbook ... 1972*, vol. II, p. 229, para. 50.

[105] See *Yearbook ... 1974*, vol. II (Part One), p. 173, para. 79.

[106] Ibid., para. 80.

[107] Ibid.

[108] Ibid., para. 81.

[109] United Nations, *Treaty Series*, vol. 1946, No. 33356, articles 41–45.

2. Draft articles on the most-favoured-nation clause, 1978

49. The question of settlement of disputes arose during both the first and the second readings of the draft articles on the most-favoured-nation clause. Some members supported the inclusion of a specific clause in that respect, which would specify the right of a party to refer a dispute for judicial settlement failing resolution by other means.[110] The Commission eventually refrained, however, from formulating any provision on settlement of disputes, on the understanding that the question "should be referred to the General Assembly and Member States and, ultimately, to the body that might be entrusted with the task of finalizing the draft articles".[111]

3. Draft articles on succession of States in respect of State property, archives and debts, 1981

50. At an early stage of the study of succession of States in respect of matters other than treaties, a diversity of views was expressed in the Commission as to the need to address the question of settlement of disputes. For some members, the Commission should "attempt to work out an adequate system"[112] of judicial settlement of disputes arising out of State succession; for others, the question "went beyond the scope of the topic and should be excluded from the Commission's work".[113] The prevailing opinion was that, pending more progress in studying the substance of the topic, any decision on the issue of dispute settlement would be premature.[114] During the subsequent sessions, however, the Commission never held a debate on the need to design a settlement of disputes procedure specific to the succession of States in respect of State property, archives and debts, even though the intention of taking up the issue at a later stage was reiterated on several occasions.[115] The Commission did not, in particular, consider the possibility of transposing to the draft articles, which it regarded as a complement to the 1978 Vienna Convention,[116] the system adopted during the United Nations Conference on Succession of States in Respect of Treaties.

51. The Vienna Convention on Succession of States in Respect of Property, Archives and Debts of 8 April 1983 provides, in Part V, a settlement of disputes regime[117] substantially identical to the mechanism embodied in Part VI of the Vienna Convention on Succession of States in Respect of Treaties.[118]

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[110] See *Yearbook ... 1976*, vol. II (Part Two), p. 10, para. 55, and *Yearbook ... 1978*, vol. II (Part Two), p. 15, para. 68.

[111] *Yearbook ... 1978*, vol. II (Part Two), p. 15, para. 69 and, for similar language on first reading, *Yearbook ... 1976*, vol. II (Part Two), p. 10, para. 55.

[112] *Yearbook ... 1968*, vol. II, p. 220, para. 71.

[113] Ibid.

[114] Ibid., para. 72. The Commission indicated that it was not possible at that early stage of the study "to determine the type of dispute which might arise from the rules proposed, and the procedures or methods of settlement best suited to those aspects concerning which it might be considered advisable to work out a system of settlement".

[115] See *Yearbook ... 1976*, vol. II (Part Two), p. 126, para. 103; *Yearbook ... 1977*, vol. II (Part Two), p. 56, para. 58; *Yearbook ... 1978*, vol. II (Part Two), p. 110, para. 122.

[116] See *Yearbook ... 1981*, vol. II (Part Two), p. 16, para. 63.

[117] See *Official Records of the United Nations Conference on Succession of States in Respect of State Property, Archives and Debts*, vol. II, articles 42–46.

[118] See para. 48 above.

4. Draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier and draft optional protocols, 1989

82. The question of the settlement of disputes in connection with the draft articles on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier was only addressed at the beginning of the second reading of the draft, and mainly because a few Governments had suggested including provisions "of a flexible nature" on the issue.[119] The suggestion met with support in the Commission.[120] Some members indicated that the most appropriate form for including settlement of disputes clauses would be that of an optional protocol annexed to the instrument to be adopted, as had been done in the 1961 Vienna Convention on Diplomatic Relations,[121] the 1963 Vienna Convention on Consular Relations and the 1969 Convention and Special Missions. The Special Rapporteur, while recognizing the merits of that approach, also mentioned as an alternative course the one taken in the 1975 Vienna Convention on Representation of States in their Relations with International Organizations of a Universal Character, which provides for the settlement of disputes through consultations and conciliation.[122]

83. At the end of the second reading of the draft articles, the Commission recommended to the General Assembly that an international conference of plenipotentiaries be convened to conclude a convention on the status of the diplomatic courier and the diplomatic bag not accompanied by diplomatic courier.[123] It decided to leave it to the conference "to resolve the usual problems relating to the final clauses of the convention and to the peaceful settlement of disputes".[124]

5. Draft articles on jurisdictional immunities of States and their property, 1991

84. At the forty-eighth session of the Commission, in 1986, the Special Rapporteur on jurisdictional immunities of States and their property proposed a number of amendments to the articles previously adopted on first reading, as well as a number of new draft articles, including provisions for the settlement of disputes, stating that the insertion of a procedure for the settlement of disputes was "increasingly fashionable"[125] in recent works of codification. The Special Rapporteur presented two options for the topic under consideration. On the one hand, the dispute of settlement clauses could cover disputes concerning the application and interpretation of the articles in general, or be confined to specific aspects of the topic, whether or not on the basis of reciprocity.[126] On the other hand, the need for a dispute settlement clause might depend on the substance of the draft articles. In the specific context of the topic, he noted that there could only be a dispute if a court decided to exercise jurisdiction in proceedings involving another State. Where such jurisdiction had been exercised, only rarely had the State which

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[119] ... (1988, vol. II (Part Two), p. 97, para. 489).

[120] ... (1988, vol. II (Part Two), p. 97, para. 492. On the settlement of disputes clauses ... Vienna Convention on Representation of States in their Relations with ... Organizations of a Universal Character, see para. 32 above.

[121] ... (1989, vol. II (Part Two), p. 13, para. 66).

[122] ... (1986, vol. II (Part One), p. 33, para. 45).

had been refused jurisdictional immunity taken any measure or step other than the mere presentation of a protest. In the light of that practice, the Special Rapporteur suggested that the Commission might not find it absolutely necessary to include dispute settlement provisions in the draft articles, and stated that he himself would not propose the inclusion of such provisions. Nevertheless, he added that one might wish to guard against the emergence of a new trend which could entail not only the use of jurisdiction in proceedings involving the interest of another State, but also the exercise of enforcement measures against its property. In order to discourage vexatious litigation, there might be a growing need to devote a part of the draft to the settlement of disputes, which might have the effect of discouraging courts from allowing provisional or enforcement measures against State property. The Special Rapporteur suggested that, should the Commission find it expedient to include such provisions in the draft articles, the regime established under the Vienna Convention on Succession of States in Respect of Treaties[127] might provide an appropriate precedent in that regard.[128]

55. In his preliminary report presented to the Commission at its fortieth session, the new Special Rapporteur noted that the Commission had not given thorough consideration to the question of a settlement of disputes mechanism due to lack of time.[129] During the discussion at the forty-first session of the Commission, one member expressed the view that it might not be appropriate to include rules on the settlement of disputes in the draft articles. He suggested that, should the draft articles take the form of a future convention, the legal mechanism for dispute settlement would most appropriately be incorporated in an optional protocol to the convention. Several members favoured leaving the question to be determined by a diplomatic conference.[130] It was also pointed out that an indication of the preference of the General Assembly would be useful before the Commission addressed the matter further.[131]

56. The convention adopted by the General Assembly on 2 December 2004[132] contains a settlement of disputes regime based on the proposal made by the chairman of the Ad Hoc Committee on Jurisdictional Immunities of States and Their Property.[133] It provides that State parties should try to settle their disputes through negotiation. If a dispute concerning the interpretation or application of the Convention cannot be settled within reasonable time, it shall, at the request of either party, be submitted for arbitration. If the parties cannot agree upon the organization of the arbitration within six months of such a request, the dispute may be referred to the International Court of Justice by either party, in accordance with the Statute of the Court.[134] The dispute settlement procedure is, however, subject to reservation by State parties.[135]

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[127] United Nations, *Treaty Series*, vol. 1946, No. 33356. See para. 48 above.

[128] *Yearbook ... 1986*, vol. II (Part One), p. 33, paras. 46 and 47.

[129] A/CN.4/415, para. 274.

[130] *Yearbook ... 1991*, vol. II (Part Two), p. 13, para. 26.

[131] Ibid.

[132] United Nations Convention on Jurisdictional Immunities of States and Their Property (General Assembly resolution 59/38, annex).

[133] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 22* (A/59/22), annex II, sect. A.

[134] United Nations Convention on Jurisdictional Immunities of States and Their Property, article 27 (1) and (2).

[135] Ibid., article 27 (3).

6. Draft articles on the responsibility of States for internationally wrongful acts, 2001

In the lengthy drafting history of the draft articles on the responsibility of States for internationally wrongful acts, the Commission discussed both the general question of whether to include a dispute settlement mechanism for the entire set of draft articles and the specific issue of whether there was a connection to be made between such a mechanism (or other available dispute settlement procedures) and recourse to countermeasures.

With regard to the first question, it should be noted that, while the draft articles adopted on first reading in 1996 included a set of seven articles, as well as provisions on settlement of disputes, the final draft adopted on second reading in 2001 contained no across-the-board provision concerning the settlement of disputes regarding the interpretation or application of the draft articles.

The possibility of including in the draft articles general provisions relating to the settlement of disputes was discussed by the Commission from the earliest years of its work on this topic. At the fifteenth session, in 1963, two members of the subcommittee established by the Commission to consider general aspects of the topic had submitted memorandums in which they emphasized the importance of compulsory dispute settlement procedures.[136] However, the initial programme of work on the topic proposed by the subcommittee and endorsed by the Commission did not envisage a part relating to dispute settlement.[137] At its twenty-first session, in 1969, the Commission reviewed its plan of work and decided to consider at a later stage the possibility of examining certain problems concerning the implementation of the international responsibility of States and questions relating to the settlement of disputes.[138]

When the question was discussed on first reading,[139] some members called for the elaboration of dispute settlement provisions.[140] It was pointed out that, in the light of the reluctance of States to accept third-party dispute settlement

... 1963, vol. II, pp. 247-250 (Mr. Tsuruoka) and pp. 244-246 (Mr. Paredes).

... annex I.

... 1993, vol. II, p. 125, document A/7610/Rev.1, paras. 80-82. The Commission's ... the possibility of a third stage relating to dispute settlement, met with general ... Committee of the General Assembly during its consideration of the ... annual report (*Official Records of the General Assembly, Twenty-fourth Session, ... agenda items 86 and 94 (b)*, document A/7746, paras. 86-89).

... part three concerning the settlement of disputes was first considered by the ... at its thirty-seventh and thirty-eighth sessions in 1985 and 1986, on the basis of ... fifth and seventh reports (respectively, *Yearbook ... 1985*, vol. II (Part One), ... A/CN.4/389 and *Yearbook ... 1986*, vol. II (Part One), p. 1, document ... and Add.1). A set of draft articles and the related annex were then referred to the ... Drafting Committee. The issue continued to be considered at the forty-fifth session of the ... 1993, this time on the basis of Mr. Arangio-Ruiz's fifth report (*Yearbook ...* ... (Part One), document A/CN.4/453 and Add.1-3), when the corresponding ... were again referred to the Drafting Committee (*Yearbook ... 1993*, vol. II (Part Two), ... and 206). The relevant articles, with commentaries, were adopted by the ... reading at its forty-seventh session in 1995 (*Yearbook ... 1995*, vol. II (Part ... para. 364 for the articles and commentaries, see pp. 75-83).

... 1993, vol. II (Part Two), p. 24, paras. 159-161. See also *Yearbook ... 1993*, vol. II ... para. 224.

procedures, it was still premature for the Commission to embark in that direction[141] and that the Commission should be careful not to make proposals that States would not accept.[142] Doubts were also expressed as to the possibility of devising a single regime for all types of responsibility disputes, and of distinguishing between the general question of responsibility and the problem of the primary rules the violation of which gave rise to such responsibility.[143] The majority of the Commission, however, supported the inclusion of a dispute settlement mechanism, which was generally considered necessary for the implementation of the draft articles.[144] It was emphasized, in that regard, that States had displayed increased willingness to accept dispute settlement procedures in recent times.[145]

61. The overall issue of dispute resolution was again considered by the Commission at the end of the second reading.[146] Some members favoured including dispute settlement provisions in the draft articles, particularly if the Commission were to recommend the elaboration of a convention, because of the significance and complexity of the topic and to enhance the capacity of courts and tribunals to develop the law through their decisions.[147] Some other members, however, considered it unnecessary to include such provisions, noting that it could cause an overlap with existing dispute settlement mechanisms, thus leading to their fragmentation and proliferation.[148] The proposal was also made to draft a general dispute settlement provision similar to Article 33 of the Charter.[149] The Commission decided that it would not include provisions for a dispute settlement machinery, but would draw attention to the machinery elaborated on first reading as a possible means for settlement of disputes concerning State responsibility, leaving it to the General Assembly to consider whether, and in what form, provisions for dispute settlement could be included in the event that the Assembly should decide to elaborate a convention.[150]

62. The Commission also considered the question of clauses relating to the settlement of disputes with specific reference to the issue of resort to countermeasures. In order to remedy the possible drawbacks of unilateral countermeasures, it was initially proposed that the relevant regime be supplemented

[141] *Yearbook ... 1985*, vol. II (Part Two), p. 24, para. 160; *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 221.

[142] *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 223 and p. 38, para. 225.

[143] Ibid., p. 39, paras. 230-231.

[144] *Yearbook ... 1985*, vol. II (Part Two), p. 24, paras. 159-161. See also *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 221.

[145] *Yearbook ... 1993*, vol. II (Part Two), p. 37, para. 222.

[146] In his first report, the new Special Rapporteur, Mr. Crawford, had noted that the Commission's decision on this issue would depend to a great extent upon the eventual form of the draft articles, which he suggested should be dealt at a later stage (document A/CN.4/490, paras. 33, 38 and 42). The Special Rapporteur also pointed to the fact that "[a]ny compulsory system of dispute settlement under the draft articles potentially becomes a general dispute settlement for inter-State disputes" (ibid., para. 33).

[147] *Yearbook ... 2001*, vol. II (Part Two), p. 23, para. 57.

[148] Ibid., para. 58.

[149] Ibid., para. 59.

[150] Ibid., para. 60. In its recommendation to the General Assembly, the Commission specified that it "was of the view that the question of the settlement of disputes could be dealt with by the [...] international conference [of plenipotentiaries], if it considered that a legal mechanism on the settlement of disputes should be provided in connection with the draft articles" (*Yearbook ... 2001*, vol. I, p. 305, para. 71 (2709th meeting)).

by a three-step third-party dispute settlement mechanism (conciliation, arbitration and judicial settlement).[151] While that approach was questioned by some members, it was favoured by others, who pointed out that such a mechanism would protect States from abuses of the right to resort to unilateral measures.[152] On first reading, the Commission decided to include a provision on the conditions for resort to countermeasures, whereby an injured State taking such measures was notably under the prior duty to negotiate and to comply with the obligations in relation to dispute settlement arising under part three of the draft articles or any other binding dispute settlement procedure in force with the wrongdoing State. On second reading, however, that text was criticized as being unfounded in international law and as unduly cumbersome and restrictive.[153] A simplified provision was thus adopted in the final draft articles in 2001.[154]

7. Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, 2006

63. During the fifty-sixth session of the Commission, in 2004, the Special Rapporteur in his second report proposed a set of draft principles, including a clause on settlement of disputes which provided a regime including arbitration or submission to the International Court of Justice on the basis of mutual agreement.[155] The text adopted by the Commission on first reading at the same session, however, did not include such a clause on the understanding that the final form of the instrument would be reconsidered in the light of the comments and observations received from Governments.[156] The question of the settlement of disputes clause would be revisited should the Commission have to prepare a draft framework convention in the future.[157]

8. Draft articles on the law of transboundary aquifers, 2008

64. The need for a settlement of disputes regime in connection with the law of transboundary aquifers was mentioned during the debate at the fifty-fifth session of the Commission on the basis of the first report of the Special Rapporteur, in which reference was made to the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, which includes compulsory reference to an impartial fact-finding commission.[158] The Special Rapporteur had also recalled that the question of whether a compulsory fact-finding regime was practical was solved by allowing States to make reservations.[159]

[151] See the proposal by Special Rapporteur Arangio-Ruiz, as described in *Yearbook ... 1993*, vol. II (Part Two), p. 36, para. 234.

[152] Ibid., p. 38, para. 228.

[153] Fourth report on State responsibility by Mr. James Crawford, Special Rapporteur, document A/CN.4/517, para. 67.

[154] See draft article 52 and commentary thereto, *Yearbook ... 2001*, vol. II (Part Two), pp. 135-137.

[155] *Official Records of the General Assembly, Fifty-ninth Session, Supplement No. 10* (A/59/10), note 342.

[156] Ibid., p. 197.

[157] Ibid.

[158] Ibid., *Fifty-eighth Session, Supplement No. 10* (A/58/10), p. 266, para. 405. On the settlement of disputes clauses of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, see para. 42, above.

[159] A/CN.4/533, paras. 10 and 11.

65. The articles proposed by the Special Rapporteur at the fifty-seventh session of the Commission did not include any general clause concerning settlement of disputes, but an option to establish a fact-finding body to assess the effect of planned activities was provided in draft article 17, paragraph 2.[160] Some members stressed the need for separate provisions on settlement of disputes.[161] The Special Rapporteur, however, questioned that necessity as transboundary aquifers, unlike watercourses, did not have a long history of international cooperation and the settlement of disputes regime adopted in the Watercourses Convention had partially been reflected in the current draft articles.[162]

66. On second reading of the draft articles, at the sixtieth session, the Commission recommended that the General Assembly adopt a two-step approach, namely, that it first take note of the draft articles and then consider the elaboration of a convention based on the draft. In so doing, the Commission decided to leave the issue of the inclusion of dispute settlement articles aside, as they would only be necessary if and when the second step were to be initiated.[163]

IV. Recent practice of the General Assembly in relation to settlement of disputes clauses

67. Pursuant to the request by the Commission that the Secretariat prepare a note on the history and past practice of the Commission in relation to settlement of disputes clauses, "taking into account recent practice of the General Assembly", the present section focuses on conventions which were not formulated and adopted on the basis of draft articles elaborated by the Commission. During the last 15 years, the General Assembly has adopted six conventions and three protocols which were not based on a draft prepared by the Commission, and which contain provisions relating to the settlement of disputes between the parties. These instruments all provide for the same mechanism for the settlement of disputes between their respective parties.

68. The three conventions relating to the suppression of terrorism — the 1997 International Convention for the Suppression of Terrorist Bombings,[164] the 1999 International Convention for the Suppression of the Financing of Terrorism[165] and the 2005 International Convention for the Suppression of Acts of Nuclear Terrorism[166] — were drafted by the ad hoc committee on measures to eliminate terrorism.[167] The clauses pertaining to the peaceful settlement of disputes in these Conventions provide that States parties shall endeavour to settle disputes concerning the application or interpretation of the Convention by negotiation. A dispute which cannot be settled by negotiation within a reasonable time shall, at the request of either party, be submitted to arbitration. If, within six months from the date of the

[160] A/CN.4/551, para. 36.
[161] *Official Records of the General Assembly, Sixtieth Session, Supplement No. 10* (A/60/10), p. 40, para. 60.
[162] Ibid., p. 43, para. 106.
[163] Ibid., *Sixty-third Session, Supplement No. 10* (A/63/10), pp. 28 and 29, para. 54.
[164] United Nations, *Treaty Series*, vol. 2149, No. 37517. See article 20.
[165] Ibid., vol. 2178, No. 38349. See article 24.
[166] General Assembly resolution 59/290, annex. See article 23.
[167] Established pursuant to General Assembly resolution 51/210 of 17 December 1996.

request, the parties are unable to agree on the organization of the arbitration, any party may refer the dispute to the International Court of Justice, by application, in conformity with the Statute of the Court. A State party may at the time of signature, ratification, acceptance or approval of the Convention, make a reservation with regard to the settlement of disputes procedure.

69. The same procedures for the settlement of disputes were included in the 2000 United Nations Convention against Transnational Crime,[168] including its three protocols (the 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air,[169] the 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children[170] and the 2001 Protocol against the Illicit Manufacturing of and Trafficking in Firearms, Their Parts and Components and Ammunition[171]); the 2003 United Nations Convention against Corruption;[172] and the 2006 International Convention for the Protection of All Persons from Enforced Disappearance.[173]

[168] United Nations, *Treaty Series*, vol. 2225, No. 39574.
[169] Ibid., vol. 2241, No. 39574. See article 20.
[170] Ibid., vol. 2237, No. 39574. See article 20.
[171] Ibid., vol. 2326, No. 39574. See article 16.
[172] Ibid., vol. 2349, No. 42146. See article 66.
[173] General Assembly resolution 61/177, annex. See article 42.